On the objection being upheld, there was no cross-examination of the witness. Defence counsel then proceeded to call the other two passengers and without giving the benefit of cross-examination to the prosecution. On this unchallenged evidence for the defence, the learned magistrate then proceeded to hold that the defence had rebutted the presumption under the Road Traffic Ordinance and acquitted and discharged the respondent.

Now, this is a remarkable state of affairs, a state brought about entirely by the submission of defence counsel on the law of evidence. It is no wonder then that the learned public prosecutor should urge as his main grounds of appeal that:—

"(a) The learned magistrate erred in law and in procedure when he refused to allow the prosecutor to cross-examine the witnesses for the defence;

(b) The learned magistrate erred in law when he misinterpreted section 154 of the Evidence Ordinance 1950."

Section 154 of the Evidence Ordinance reads as follows:—

"The court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party."

I stress the words "the person who calls a witness."

This particular section of the Evidence Ordinance, on a proper construction, relaxes the prohibition of putting leading questions to a party's own witness. When a witness, by his conduct and evidence, shows that he is giving or about to give evidence against the party who calls him, then, at the discretion of the court, this party could cross-examine him.

Defence counsel, who appeared for the defence at this stage, relied on the following passage in *Sarkar* on Evidence (10th Edition) page 1218. It reads:—

"Where the prosecution merely tenders witness as 'gained over' without examining him, he cannot be allowed to be cross-examined by the prosecution."

The whole point, however, is, as I should have thought, that it was abundantly clear to even the most myopic, that these 3 passengers were not tendered as witnesses for the prosecution. They were not offered for cross-examination. They were made available to the defence. The defence duly called them as witnesses for the defence. They were heard in examination-in-chief. The right of the defence to cross-examine witnesses for the prosecution is, as I should have thought, as undoubted as the right of the prosetion to cross-examine witnesses for the defence. It is, in fact, laid down in law and in section 138(1) of the Evidence Ordinance:—

"138. (1) Witnesses shall be first examined-in-chief, then, if the adverse party so desires, cross-examined, then, if the party calling them so desires, re-examined."

There is, therefore, no justification whatsoever in excluding the right of the prosecution to examine witnesses for the defence. The submission of learned counsel for the defence is wrong in law and completely misleading. I am glad to note this morning that learned counsel for the respondent does not oppose the appeal. However, magistrates and judges should be able to expect from members of the bar correct guidance and submission on the law, more particularly so when the magistrate, as in this case, is not qualified in law. It is clear that in this case the learned trial magistrate did not obtain from the defence counsel the assistance which he had a right to expect.

I must hold that the exclusion of the right of cross-examination of defence witnesses from the prosecution has occasioned a complete miscarriage of justice. I, therefore, set aside the order of acquittal and order a retrial before another magistrate.

In conclusion, it may be salutary to all to remind ourselves of the following passage from Crampton J. who, replying to the suggestion that counsel was the mere mouthpiece of his client, said in *R.* v. *O'Connell* (2):—

"Such, I do conceive, is not the office of an advocate. His office is a higher one. To consider him in that light is to degrade him. I would say of him as I would say of a member of the House of Commons — he is a representative, but not a delegate. He gives to his client the benefit of his learning, his talents and his judgment; but all through he never forgets what he owes to himself and to others. He will not knowingly misstate the law — he will not wilfully misstate the facts, though it be to gain the cause for his client. He will ever bear in mind that if he be the advocate of an individual, and retained and remunerated (often inadequately) for his valuable services, yet he has a prior and perpetual retainer on behalf of truth and justice; and there is no Crown or other licence which in any case, or for any party or purpose, can discharge him from that primary and paramount retainer."

Order of acquittal set aside. Retrial ordered.

Solicitors: *Yeap & Yeap.*

OVERSEA CHINESE BANKING CORPORATION LTD. v. TAN CHENG HOE

[O.C.J. (Ali J.) November 14, 1966]

[J.B. — Originating Summons No. 14 of 1966]

Banks and Banking — Chargee — Application to sell lands belonging to deceased chargor — Whether bank entitled to charge interest on balance owing on the footing of "monthly rests" — National Land Code, 1965, s. 256.

This was an application by the bank as chargee of certain lands for an order to sell these lands charged by one *T* deceased (who died in 1942) under section 256 of the National Land Code. *T* had charged these lands before his death to secure an overdraft account of $30,000 at the rate of 65 cents per $100 *per mensum* with monthly rests, commission and bank charges. In clause 2 of the charge it was provided that "And if, when

the current account shall be closed either by service of such notice in writing as aforesaid or by my death, a balance shall be owing to the bank by me, I, or my legal personal representatives as the case may be, will so long as the same or any part thereof shall remain owing, pay to the bank interest thereon at the aforesaid rate of 65 cents per $100 *per mensum* computed from the time when such balance shall have been ascertained: and I agree that the statement of any duly authorised officer or agent or agents of the bank as to the amount of such balance shall be final and conclusive." The sole question for consideration was whether subsequent to the chargor's death the bank was entitled to charge interest on the balance owing on the footing of monthly rests i.e. to charge only simple interest.

Held: subsequent to the date of the chargor's death the bank was not entitled to charge interest on the balance owing on the footing of monthly rests. The computation of interest however shall be subject to the restrictions imposed by the Moratorium Proclamations of 1945 or other legislation in force in Singapore. The defendant had shown cause to the contrary within the meaning of section 256(3) of the National Land Code and the bank's application for the sale of the lands should be dismissed with costs.

Cases referred to:—

(1) *Cockburn* v. *Alexander* (1848), 6 C.B. 791.

(2) *Burton* v. *English* (1883), 12 Q.B.D. 218.

(3) *Fergusson* v. *Fyffe* (1841), 8 Cl. & Fin. 121.

(4) *Barfield* v. *Loughborough* (1872), L.R. 8 Ch. App. 1.

(5) *Crosskill* v. *Bower* (1863), 32 Beav, 86; 32 L.J. Ch. 540.

(6) *Williamson* v. *Williamson* (1869), L.R. 7 Eq. 542.

ORIGINATING SUMMONS.

M. Kartigesu for the plaintiffs.

N. N. Leicester for the defendant.

Cur. Adv. Vult.

Ali J.: This is a chargee's application under section 256 of the National Land Code for an order to sell all lands charged by Tan Jin Chong also spelt as Tan Jeng Chong, deceased, to secure a current account with the plaintiff bank up to the limit of $30,000 for principal and for interest at the rate of 65 cents per $100 *per mensum* with monthly rests, commission and other bank charges. It was common ground that Tan Jin Chong died or was presumed to have died some time in February, 1942. According to the second clause of the charge if, when the current account shall be closed either by service of notice in writing or by the chargor's death, a balance shall be owing to the bank by the chargor, the chargor, or his legal personal representatives, as the case may be, will, so long as the same or any part thereof shall remain owing, pay to the bank interest thereon at the aforesaid rate of 65 cents per dollars one hundred *per mensum* computed from the time when such balance shall have been ascertained. In a letter dated 26th January, 1949, addressed to Messrs. Richard Chuan Hoe Lim & Co. — presumably the solicitors acting for the personal representatives of the deceased chargor — the plaintiff bank gave the balance owing as on the 15th February, 1942, as $17,786.16 (letter marked "A" attached to defendant's affidavit of the 12th August, 1966). Sometime in October, 1964, the solicitors for the defendant — the administrator of the deceased's estate, wrote to the plaintiff bank to say, among other things, that the defendant was prepared to pay the sum of $50,000 in full payment and satisfaction of the amount due and owing under the charge. The plaintiff bank apparently did not reply to this letter for on the 19th April, 1966, a notice was served on the defendant demanding the repayment of the sum of $92,791.74 for principal and interest computed up to and including the 31st day of December, 1965, and thereafter interest thereon at the rate of 65 cents per $100 *per mensum* with monthly rests to the date of payment. This notice was purported to have been issued under section 254 of the National Land Code. On the 23rd April, 1966, the solicitors for the defendant wrote to the solicitors for the plaintiff bank repeating the offer of $50,000 in full payment and satisfaction of the balance owing under the charge. On the 27th June, 1966, the plaintiff bank filed the present proceedings calling upon the defendant to show cause why the lands charged should not be sold by public auction. In his affidavit showing cause pursuant to sub-section (3) of section 256 of the Code the defendant contended that on the true construction of the provisions of the charge the plaintiff bank was not entitled to charge interest with monthly rests on the balance owing subsequent to the date of the chargor's death. This contention was founded on the ground that the account had already closed or ceased to be current. The defendant not only maintained that the plaintiff bank was entitled to simple interest at the rate given but that no interest was chargeable beyond the period of six years. At the hearing, however, the plea of limitation was abandoned and in the event the only question for consideration was whether subsequent to the date of the chargor's death the plaintiff bank was entitled to charge interest on the balance owing on the footing of monthly rests, i.e. to charge only simple interest.

The second clause of the charge, which I have already alluded to, is expressed in these words:

"AND if, when the said current account shall be closed either by service of such notice in writing as aforesaid or by my death, a balance shall be owing to the bank by me, I, or my legal personal representatives, as the case may be, will, so long as the same or any part thereof shall remain owing, pay to the bank interest thereon at the aforesaid rate of sixty-five cents (65¢) per dollars one hundred ($100) *per mensum* computed from the time when such balance shall have been ascertained: and I agree that the statement of any duly authorised officer or agent or agents of the bank as to the amount of such balance shall be final and conclusive:—"

The construction placed by the plaintiff bank on this clause was that although the term "monthly rests" is not expressly used the word "aforesaid" as underlined implies an agreement to pay interest on the footing of monthly rests even after the account had closed. For myself I am unable to see any magic in the use of the word "aforesaid" and will be content to say that it merely refers to the rate of interest and nothing more. I am inclined to say that there is no ambiguity in this clause inasmuch as it appears to me that the omission of the words "monthly rests" was deliberate. However, even if there was any ambiguity, the rule of construction to be applied is that as stated by Maule J. in *Cockburn* v. *Alexander.*[1] At page 814 the rule was stated in these words,

"Generally speaking, where there are several ways in which the contract might be performed, that mode is adopted which is the least profitable to the plaintiff, and the least burdensome to the defendant."

Something to the same effect was also said by Brett M.R. in *Burton* v. *English,*[2] at page 220,

"The general rule is that where there is any doubt as to the construction of any stipulation in a contract, one ought to construe it strictly against the party in whose favour it has been made."

Adopting these rules I would construe the second clause as carrying no implied agreement to pay, after the closing of the account, interest on the footing of monthly rests. The position here is somewhat similar to that obtained in *Fergusson* v. *Fyffe.*[3] That case was an appeal to the House of Lords on a number of questions, one of which was concerned with the accumulation of interest. The Lord Chancellor in his judgment at page 139 said:

"The question of accumulation stands upon a very different footing. Upon that subject the memorandum contains no agreement for the future; indeed it may be considered as excluding all that it does not provide for; and what it does provide for, is only payment of interest at a certain rate. It is true that practically the account had ceased to be an account current from the year 1793; but up to that time it had been, in the most correct sense, an account current, and it ceased to be so, not by any act or agreement of the parties, but by the cessation of all transactions, arising probably from the situation of Mr. Fyffe. The account, however, continued to be carried on in the same manner as before until the 30th of April 1810; and when that account was made up Mr. Fyffe was dead, he having died on the 9th of May 1810. From that time there was no party with whom any account current could be carried on, there not having been any representative of Mr. Fyffe for many years afterwards. . . . But then the inquiry is, whether the accounting parties are to be liable beyond what they have so undertaken, and are to be charged with compound interest? The first question which occurs is, can there be a title to compound interest without a contract expressed, or implied from the mode of dealing with former accounts, or custom? And if not, the absence of any party with whom any such contract can have been made, must have been fatal to the claim."

Later, in his judgment, the Lord Chancellor concluded:

"It appears to me, therefore, that the proper course would be to vary the interlocutor appealed from, by declaring that interest at 9 per cent. ought to be calculated upon the balance of 17,346.5 sicca rupees, from the 30th April 1810 up to the time of the decree, but without any compound interest or annual rests; . . . ."

This principle was followed in *Barfield* v. *Loughborough,*[4] by Lord Selborne. At page 6 the Lord Chancellor said:

"For the allowance, however, of annual rests after the dissolution of the partnership, I can find no ground in the terms of this contract. Nothing is said expressly about rests, nor about compound interest. The right to compound interest during the continuance of the partnership was derived only from the combined operation of the right to simple interest under clause 4, and the provision for the annual balancing of accounts yearly during the said co-partnership, contained in clause 20; and from the practice which, in accordance with those provisions, and with the usual course of similar partnership accounts, was actually followed till the dissolution. But it is clear that the provision for yearly accounts is inapplicable to the period after dissolution. Where the relation of partners in a going concern, in which accounts are annually to be made up, has come to an end, the usage of yearly rests, which is a mere consequence of that relation and of these accounts, comes also to its natural end.

The authorities which decide that balances due upon an account between banker and customer, kept during the continuance of that relation according to the usage of bankers, with yearly or half-yearly rests, carry simple interest only from the time when the relation of banker and customers has terminated by death or otherwise, proceed upon a principle which seems to be not less applicable to a case like the present of rests in partnership accounts: *Fergusson* v. *Fyffe*[3]; *Crosskill* v. *Bower*[5]; *Williamson* v. *Williamson.*[6]"

Applying the principles stated to the circumstances of the present case it must therefore be concluded that subsequent to the date of the chargor's death the plaintiff bank was not entitled to charge interest on the balance owing on the footing of monthly rests. The computation of interests, however, shall be subject to the restrictions imposed by the Moratorium Proclamation No. 5 of 1945 or other legislation in force in Singapore. In so concluding it must also be held that the defendant has shown cause to the contrary within the meaning of section 256(3) of the National Land Code. Accordingly the plaintiffs' application for the sale of the lands is dismissed with costs.

Application dismissed.

Solicitors: *Allen & Gledhill; Leicester & Chen.*